Supreme Court, U.S.
FILED
JUN 10 1993
OFFICE OF THE CLERK

No. 92-1890

In The

Supreme Court of the United States

October Term, 1992

RENTON SCHOOL DISTRICT, NO. 403, *et al.*,

Petitioners,

v.

RICHARD GARNETT, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Equal Access Act, 20 U.S.C. §§ 4071-4074, preempts arguably inconsistent state constitutional law.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents accept the statement of the case in the Petition.

REASONS FOR DENYING THE PETITION

This case satisfies none of the traditional criteria for *certiorari*. In its present posture, it is nothing more than a dispute over the meaning of a federal statute, the Equal Access Act, 20 U.S.C. § 4071-74. Petitioners contend that two relatively minor subsections of the Act, subsections 4071(d)(5) and (d)(7), constitute a total exemption from

the Act for every school within the State of Washington and "many" other states (those states with Establishment Clauses said to be "stricter" than that of the First Amendment). See Pet. 7. The court of appeals unanimously and sensibly rejected that argument. The decision below does not conflict with the decision of any other court, and tracks closely the analysis laid down by this Court in *Westside Community Board of Education v. Mergens*, 496 U.S. 226 (1990). It is, moveover, a straightforward interpretation of the plain language of the Act, amply supported by its purpose and legislative history.

The theory of the Petition is that this case warrants review because a federal statute was held to preempt arguably inconsistent state constitutional provisions. But there is nothing unusual in that. By its terms, the Supremacy Clause provides that federal law shall be "the supreme Law of the Land, . . . any Thing in the *Constitution or Laws of any State* to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2 (emphasis added). But even if federal statutory preemption of state constitutional law did somehow raise a significant issue, there still would be no reason to grant certiorari in this case. The supposed conflict between the Equal Access Act and the Washington State Constitution is entirely speculative: neither the state courts nor the court below have concluded that the state constitution bars voluntary, student-initiated extracurricular club meetings on the premises of a public high school. It will be time enough for this Court to consider the question presented if and when an unreversed court concludes that the state constitution forbids what the Equal Access Act requires. Such an issue should not be decided on the basis of a hypothetical conflict.

I. The Decision Below Is Plainly Correct And Does Not Conflict With The Decision Of Any Other Court

The Equal Access Act applies to "any public secondary school which receives Federal financial assistance and which has a limited open forum." 20 U.S.C. § 4071(a). It is undisputed that Lindbergh High School is a public secondary school, that it receives federal financial assistance, and that it has a limited open forum. Pet. 3. The Act therefore applies to Lindbergh High School – unless another provision of the Act creates an exemption.[1]

Petitioners' argument for exemption rests on two subsections of the Act:

> Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof –
>
> . . .
>
> (5) to sanction meetings that are otherwise unlawful; [or]
>
> . . .
>
> (7) to abridge the constitutional rights of any person.

20 U.S.C. § 4071(d)(5), (d)(7). Petitioners contend that these subsections exempt Lindbergh High School from the Act because, under the Washington Constitution,

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[1] Petitioners' repeated statement that the question here is whether the Act "*implicitly*" preempts state law (Pet. i, 7, 8 (emphasis in original)) is incorrect. This is a case of express preemption. The only issue is whether subsections 4071(d)(5) and (d)(7) create an exemption from the otherwise clear requirements of the Act.

allowing student religious meetings would be "unlawful" and "unconstitutional."

The Ninth Circuit unanimously rejected petitioners' argument. Pet. App. A9-A13. Even Judge Farris, who wrote a separate concurrence passionately criticizing what he considers to be the Act's "intrusion on state sovereignty" (Pet. App. A14),[2] was forced to conclude that "Congress intended to preempt state law." *Id.* Not a single judge in the Ninth Circuit voted for rehearing or rehearing *en banc*. See Pet. App. B1-B2. No other court has reached a contrary conclusion. In the absence of any conflict or dissent, there is absolutely no reason for this Court to take the case.

The decision below is well founded. As the Ninth Circuit noted, subsections (d)(5) and (d)(7) "are designated as rules of construction, not exceptions to the Act." Pet. App. A9. "As such," the panel explained, "they instruct the court *how* to interpret the Act's central command that schools not discriminate against religious speech." *Id.* (emphasis added). They do address *whether* schools are required to comply, as petitioners assert. The core provision of the Act, section 4071(a), plainly states that *all* public secondary schools receiving federal financial assistance and maintaining a limited open forum must comply. It would be nonsensical to interpret rules of

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[2] Judge Farris also had authored the opinion rejecting the students' claims in an earlier stage of this litigation. *Garnett v. Renton School Dist. No. 403 (Garnett I)*, 865 F.2d 1121, *modified*, 874 F.2d 608 (9th Cir. 1989). That decision was vacated by this Court and remanded for reconsideration in light of *Mergens*. *Garnett v. Renton School District*, 496 U.S. 914 (1990).

"construction" as authorizing states to do precisely what the Act otherwise prohibits them from doing.

Moreover, petitioners' interpretation of subsection (d)(5) conflicts with its plain language. Section 4071(a) prohibits covered schools from discriminating against student groups "on the basis of the religious, political, philosophical, or other content of the speech at [their] meetings," and subsection (d)(5) clarifies that the schools are not required to sanction meetings that are "otherwise" unlawful – that is, unlawful for reasons *other than* the religious, political, philosophical, or other content of their speech. To treat speech as "unlawful" *because* it is religious would "render[] the term 'otherwise' meaningless," as the court below noted. Pet. App. A10.

The meaning of subsection (d)(7) is less transparent on its face, but no less clear in context. As the court of appeals held, it refers to *federal* constitutional rights. The court of appeals gave three reasons for this conclusion. First, subsection (d)(7) is a typical "savings clause" (Pet. App. A11) – not a gaping loophole. Its purpose is to ensure that the Act is not interpreted in a way that would render it *unconstitutional*. Conflict with a state constitution would not render the Act "unconstitutional," since federal statutes supersede inconsistent state law under the Supremacy Clause.[3] Second, the court concluded that

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[3] The legislative history of the Act is replete with discussions of "constitutional rights" – every one of them a reference to *federal* constitutional rights. There is not a single reference to state constitutional rights in the entire course of legislative consideration. The statement made by Senator Gorton, quoted by petitioners at Pet. 13 n.7, was in reference to versions of a

the principles of statutory construction applied by this Court in *Mergens* required rejection of petitioners' interpretation. *Id*, at A11-A12. In *Mergens*, this Court stated that the Act should be interpreted in accordance with its "broad legislative purpose" to "address perceived widespread discrimination against religious speech in public schools," and to "do more than merely validate the status quo." 469 U.S. at 239. To adopt petitioners' construction, by contrast, "would likely exempt from the Act many schools in the Ninth Circuit and in the country" (Pet. App. A12) and allow states to "evade the Act" (*id.*) by adopting convenient interpretations of their state constitutions.[4] Third, the court concluded that Congress intended to preempt state law. Pet. App. A12-A13. The protection of free speech rights is logically a matter of nationwide concern. "The Act permits schools to avoid its obligations," the court noted, "but only at a price. They must either reject federal funding or close the school's limited open forum." *Id*. at A13. It is not consistent with

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proposed constitutional amendment to permit school prayer. It had no application to the Equal Access Act, which was not debated until three months later. Indeed, since the proposals Senator Gorton discussed were permissive in nature (unlike the Equal Access Act), the Senator's point does not apply even by analogy.

[4] About half the states have establishment clauses stricter than the First Amendment. *See* Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 Va. L. Rev. 625 (1985). Even in the others, the state courts would be entitled to interpret state constitutional language as precluding equal access. This would render the Equal Access Act optional, at the discretion of the state courts.

the congressional purpose to allow states to "freely opt out of its requirements." *Id.*

Most decisively, as even petitioners concede (Pet. 14), "[t]he congressional objective in enacting the Equal Access Act was to codify the equal access guarantees of *Widmar v. Vincent*, 454 U.S. 263 (1981), and to extend the holding of *Widmar* to public secondary schools." *See Mergens*, 469 U.S. at 235. It is highly significant, therefore, that the equal access right in *Widmar* was held to preempt a state constitutional claim essentially identical to the one petitioners make in this case. *See Widmar*, 454 U.S. at 276-77. An extension of *Widmar* to secondary schools would thus naturally be understood as overriding state constitutional objections.

In support of their contrary interpretation, petitioners have nothing to offer. Nothing in the language, history, or purpose of the Equal Access Act supports the proposition that it was intended not to apply to states whose courts interpret state constitutional provisions as disallowing equal access. If Congress had intended to carve out so broad an exception to the Act, one would expect to see some discussion of the matter during the course of deliberations. There was none.

The unanimous decision of the Ninth Circuit is thus almost surely correct on the merits. There is no justification for further review.

II. Petitioners' Claim That The Decision Below Violates State Constitutional Principles Does Not Raise An Issue Meriting Review

Petitioners maintain that this case warrants review because the Act has the effect of preempting state constitutional law. But there is nothing surprising or noteworthy about that. As the plain language of the Supremacy Clause makes clear, state constitutional law is susceptible to federal preemption no less than any other form of state law. *See, e.g., Schlacter-Jones v. General Telephone*, 936 F.2d 435 (9th Cir. 1991) (federal labor law preempts state constitutional rights of privacy); *Warner Cable Communications v. City of Niceville*, 911 F.2d 634, 643 (11th Cir. 1990) (federal Cable Act preempts state constitutional prohibition against delegation of legislative authority); *Utility Workers of America v. Southern California Edison*, 852 F.2d 1083 (9th Cir. 1988) (federal law preempts state constitutional protection against drug testing program). The Washington Supreme Court itself has recognized that "the constitutional principle of federal preemption precludes application of the state constitution" when the state constitution conflicts with a federal statute. *Alverado v. Washington Public Power Supply*, 111 Wash. 2d 424, 430, 799 P.2d 427 (1988) (*en banc*); *see also Writers' Guild v. Superior Court*, 53 Cal. App. 3d 468, 478, 126 Cal. Rptr. 498, 504 (2d Dist. 1975) ("A state constitutional provision is as much preempted by federal law as is a state statute if preemption applies."). Petitioners cite no authority, and we are aware of none, that questions the legitimacy of federal statutory preemption of state constitutional provisions.

But even assuming *arguendo* that the preemption of a state constitutional provision raises a certworthy issue, there is no reason for the Court to review *this* case. No Washington state court has held that allowing voluntary student religious clubs on public school property would violate the state constitution, and such an interpretation of the state constitution would be highly implausible.[5] Petitioners are thus asking this Court to answer an entirely hypothetical question. The only Washington case cited by petitioners (Pet. 12) involves state funding of religious activities, which obviously raises different issues. *Weiss v. Bruno*, 82 Wash. 2d 199 (1973) (use of state money for tuition at religious school).

There is no basis for petitioners' extraordinary claim that to allow individual high school students to exercise free speech rights on public property, without official preference or endorsement, would constitute unconstitutional "sectarian control or influence" over the public schools. This would suggest that students could not talk to one another about religion over lunch or in the hallways – or park a car with a "Jesus Saves" bumper sticker in the school parking lot. The Washington Constitution may be "stricter" than the federal Establishment Clause, but petitioners take the idea to the point of absurdity. Precedents from the Washington Supreme Court are fully consistent with the principle that the private speech of private persons does not violate the Establishment Clause – even if they are on public property.

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[5] It is true that the district court so held in this case, but the judgment of the district court was reversed by the Ninth Circuit (which did not reach the state constitutional issue).

In any event, there is no need for this Court to take the case to resolve this purely hypothetical problem. If the courts of Washington or elsewhere should hold that allowing equal access violates the state constitution, it will be time enough for this Court to decide whether that raises a certworthy issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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